HAJAR ISHAK

v.

PP

HIGH COURT MALAYA, JOHOR BAHRU
ZAINUN ALI J
[CRIMINAL APPEAL NO: 41-52-1998]
24 FEBRUARY 2000

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Accused convicted upon plea of guilty - Whether right to appeal against conviction available - Discretion of appellate court - Whether plea of guilty could properly be accepted - Whether there was miscarriage of justice - Powers of revision - Criminal Procedure Code, ss. 305, 325 - Notice of appeal filed out of time, discretion of court*

EVIDENCE: *Documentary evidence - Document purporting to be a report - Chemist's report - Criminal Procedure Code, s. 399(1) - Requirements - Delivery of copy to accused before commencement of trial - Non-compliance - Whether chemist's report admissible in evidence - Whether s. 399 procedural or evidential - Whether breach a curable irregularity or an incurable illegality - Whether s. 399(1) still applies when accused pleads guilty*

CRIMINAL PROCEDURE: *Plea of guilty - Duty of trial judge - Improper procedures followed - Whether plea unequivocal - Whether accused understood nature and consequences of her plea - Whether essential ingredients of offence explained to and understood by accused - Whether s. 173 Criminal Procedure Code strictly complied with - Whether plea of guilty could properly be accepted - Appeal against conviction*

WORDS & PHRASES: *"commencement of the trial" - Criminal Procedure Code, s. 399(1) - Whether means commencement of contentious phase of trial when prosecution leads evidence after accused pleads not guilty - Or when charge is read to accused irrespective of whether he claims trial - Or when prosecution adduces evidence by way of statement of facts after accused pleads guilty - Whether proceeding subsequent to accused pleading guilty a trial*

The appellant's husband was detained by the police at a road-block on 4 January 1996. In the motorcar, registered under the appellant's name, was found a plastic packet containing 7.7g of heroin.

The appellant was produced in court on 3 June 1998 as a witness in her husband's case, whereupon, it was alleged that she had admitted that the said drugs belonged to her. She was arrested on the same day and charged in court the following day. Her husband, however, was subsequently released. Although unrepresented, the appellant pleaded guilty to the charge and was convicted and sentenced to eight years' imprisonment. The same chemist's report served earlier on the appellant's husband was used when the facts and exhibits were tendered in court prior to sentencing, even though s. 399(1) Criminal Procedure Code ('CPC') was not adhered to. It also appeared that the contents of the chemist's report were not read or explained to the appellant.

On 13 June 1998, whilst in prison, the appellant filed a notice of appeal against her sentence. Subsequently, upon engaging counsel, she filed an application on 10 September 1999 to include an appeal against her conviction as well. The prosecution took objection on the ground that under s. 305 CPC, the appellant was precluded from appealing against her conviction. The appellant argued that the court had discretion under s. 325 CPC to allow such an appeal, by applying its powers of revision. It was further argued that the non-service of the chemist's report in accordance with s. 399(1) CPC had rendered the appellant's plea of guilty invalid as it could not possibly have been unequivocal; that the appellant did not understand the nature and consequences of her plea of guilty; and that the non-service of the chemist's report in accordance with s. 399(1) CPC had rendered the same inadmissible, and that its wrongful admission had occasioned a miscarriage of justice.

Held:

[1a] To be valid, the appellant's plea of guilty must be unequivocal, and the test laid down in *Ganesan Kannan v. PP* must be adopted. To determine the validity of the plea of guilty, the safeguards propounded in *Lee Weng Tuck v. PP* should be observed.

[1b] The appellant must understand the nature and consequences of her plea. The essential ingredients of the offence must be explained to her and the court must ensure that she understood it.

[2] Section 305 CPC provides that a person who has been convicted on his plea of guilty is entitled to appeal only against the extent or legality of his sentence. However, the court is entitled to, and will where appropriate, act in revision and set aside the conviction. In the instant appeal, upon revision, the proper order for the court to make would be to set aside the plea of guilty and substitute it with a plea of not guilty and send the case back to the trial court. (*PP v. Mohamed Termizi*).

[3a] Section 399(1) CPC relates to the admissibility of evidence and is not merely procedural. The ten-day rule under s. 399(1) CPC must be complied with before the chemist's report could be tendered in court. If the report could, indeed, be said to be admissible *per se*, then there would be no need to enact s. 399(1) CPC at all.

[3b] Section 399(1) CPC applies even when an accused pleads guilty. Thus, the chemist's report would only be admissible if the prosecution had served a copy of the same on the accused ten days before the commencement of her trial.

[3c] As the chemist's report was admitted in contravention of s. 399(1) CPC, it was an 'irregularity of a serious nature' and was inadmissible evidence despite its admission; the trial court would have to eradicate such inadmissible evidence from its mind completely. Section 422 CPC could not assist the prosecution as non-compliance with s. 399(1) CPC was not a mere irregularity, but a nullity.

[4] Even when an accused person pleads guilty, the prosecution is still required to prove its case by presenting the facts and tendering documents and exhibits, all of which will have to be explained to and understood and accepted by the accused.

[5] The court can exercise its discretion to extend time where an appeal is filed out of time, in order that substantial justice may be done in the matter.

[6] A person should not be charged in court until the investigation into the case has been completed and there is *prima facie* evidence to prosecute him on the charge. (*PP v. Tan Kim San*).

[Appeal allowed; conviction and sentence quashed; retrial ordered.]

Case(s) referred to:

Chah Siew Kok v. PP [1987] 1 CLJ 386 ***(foll)***
Chen Chong v. PP [1967] 2 MLJ 130 ***(refd)***
Chong Peng v. PP [1954] 1 MLJ 39 ***(refd)***
Chong Yik v. PP [1953] MLJ 72 ***(refd)***
Chunbidya & Ors v. Emperor AIR [1935] PC 35 ***(refd)***
Dorai Manickam v. R [1936] MLJ 261 ***(refd)***
Emperor v. Nasrullah & Ors AIR [1928] All 287 ***(refd)***
Eng Song Hai v. PP [1954] 20 MLJ 38 ***(refd)***
Ganesan Kannan v. PP [1996] 3 SLR 560 ***(foll)***
Goh Tong v. PP [1953] 1 MLJ 251 ***(refd)***
Hassan Dollah v. PP [1996] 5 MLJ 291 ***(refd)***
Heng Kim Khoon v. PP [1972] 1 MLJ 30 ***(refd)***
Lee Weng Tuck v. PP [1989] 2 MLJ 143 ***(foll)***

Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35 ***(refd)***
Low Hiong Boon v. PP [1948-1949] MLJ Supp ***(foll)***
Mohamed Abdul Rahman v. PP [1979] 1 MLJ 252 ***(refd)***
Mok Swee Kok v. PP [1994] 3 SLR 140 ***(refd)***
Ng Yee v. PP [1953] MLJ 250 ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304 ***(foll)***
PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 ***(refd)***
PP v. Leng Chow Teng [1985] 1 CLJ 157 ***(refd)***
PP v. Lim Chen Len [1981] 2 MLJ 41 ***(refd)***
PP v. Soon Tiew Choon [1976] 1 MLJ 189 ***(refd)***
PP v. Tan Kim San [1980] 2 MLJ 98 ***(foll)***
Queen Empress v. Mukundi Lal ILR 21 All 189 ***(refd)***
R v. Khoo Kee Thye & Ors [1936] MLJ 243 ***(refd)***
R Ramanathan Chettiar v. Sivarama Subrahmanya Ayyar ILR 47 Mad 722 ***(refd)***
Savrimuthu v. PP [1987] 1 CLJ 368 ***(refd)***
Sjn Thomas Manivello v. Lt Kol Din Yati Dahlan Yang DiPertua Mahkamah Tentera Kuala Lumpur [1998] 3 CLJ 761 ***(dist)***
Tai Chai Keh v. PP [1948-1949] MLJ Supp 105 ***(refd)***
Tay Tuan [1953] MLJ 20 ***(refd)***
Veerasingam v. PP [1958] 24 MLJ 76 ***(refd)***
Wong Kok Keong v. R [1955] MLJ 13 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(b), 305, 310, 325, 399(1), 422
Criminal Procedure Code (Straits Settlement), s. 427(1)
Evidence Act 1950, s. 32

Other source(s) referred to:
Jowitts Dictionary of English Law, 2nd edn

For the appellant - R Paramanandan; M/s Elyas Majeed & Co
For the prosecution - Haslinda Abu Bakar DPP

Reported by Alex KC Lee

JUDGMENT

Zainun Ali J:

The appellant, in exercising her legal right to appeal the decision of the learned Sessions Court judge, had unwittingly raised several points of law which merit scrutiny, and deliberation.

The Facts

In a macabre turn of events, the appellant who was then at Pusat Serenti and who was originally a witness in her husband's trial in the Sessions Court on 3 June 1998, suddenly admitted to the charge which was preferred

against her husband. The appellant also stated in this case that her husband is blameless. However, nowhere in the notes of evidence before this court was it explained what was the charge preferred against the appellant's husband.

The appellant was then arrested and detained the same day (3 June 1998), while her husband was released on 8 July 1998.

On the following day, ie, 4 June 1998, a charge was prepared against the appellant and on the same day, the appellant was charged in the Sessions Court, Johor Bahru. The appellant pleaded guilty and was sentenced to eight years imprisonment with effect from that day. It was alleged that the prosecution case against the appellant was based on a chemist report dated 8 February 1996. This chemist report was apparently not served on the appellant but was served on the appellant's husband when he was charged earlier. It was alleged that the prosecution had erroneously caused the Sessions Court Judge to admit the said chemist report as evidence and have it marked as P2 in the case against the appellant.

It should also be noted that the appellant was not represented in the Sessions Court.

On 13 June 1998, the appellant filed a notice of appeal against the sentence imposed on her by the Sessions Court. This was done with the aid of the prison authorities presumably under the apprehension that the appellant only had a legal right to appeal against her sentence as she had pleaded guilty. She engaged solicitors to represent her in mitigating her sentence during the said appeal.

On 10 September 1999, the appellant filed an application to amend the notice of appeal to read "Rayuan terhadap sabitan dan hukuman" from the original "Rayuan terhadap hukuman". This was supported by the affidavit of her counsel, the late Encik Mohamad Elyas Majeed affirmed on 10 September 1999. This, in effect amended the appeal from one against sentence to one of both conviction and sentence.

The Deputy Public Prosecutor (DPP), Puan Haslinda bt Abu Bakar, filed an affidavit in reply affirmed on 26 October 1999 which states categorically that the appellant's said application was filed late by eleven months and one day from the date the court allowed extension of time to file the notice of appeal. The learned DPP also submitted that since the appellant had pleaded guilty she was precluded from appealing against the conviction and that she could only appeal as to the extent or legality of the sentence.

The learned DPP also submitted that in the event the appellant was allowed to appeal against conviction, such notice of appeal was filed out of time. Learned counsel for the appellant however argued that this preclusion was not an absolute bar and did not fetter the court's discretion to allow such an appeal.

Among others, the appellant's application turns on the question of both enlargement of time and whether s. 305 Criminal Procedure Code (CPC) would apply. Dealing firstly with the extent or legality of the sentence, s. 305 CPC reads:

> 305. **When plea of guilty limited right of appeal.**
>
> When an accused person has pleaded guilty and being convicted by a Magistrate on such plea, there shall be no appeal except as to the extent or legality of the sentence.

In *Low Hiong Boon v. PP* [1948-49] MLJ Supp, Spenser Wilkinson J observed that:

> The appellant appealed both against conviction and sentence. At the hearing before me the DPP pointed out that as she had pleaded guilty the appeal could only be against the sentence and he cited section 305 of the Criminal Procedure Code. This provision, however, does not, in my view, preclude an Appellate Court from considering the question whether the plea of guilty was one which could properly be accepted in the circumstances; and for the reasons which I will now proceed to set out, I was of the opinion that this was not a case in which the guilty plea should have been accepted. I, therefore had no alternative but to quash the conviction and sentence to order that the appellant be re-tried before another President of a Sessions Court.

Thus the question before this court is whether this is a case in which the appellant's plea of guilty could properly have been accepted.

Such a question naturally turns on whether there is a miscarriage of justice and if that be the case, whether the court's powers of revision may be invoked.

It was explained by Lord Atkin in *Chunbidya & Ors v. Emperor* AIR [1935] PC 35 that:

> ... Their Lordships are clearly of opinion that when the High Court has before it an appeal record of a criminal proceeding, the condition precedent is performed and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revision powers if it chooses to do so.

The relevant provision for the court's revisionary powers is found in s. 325 CPC where the judge in exercising his powers therein, has to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the inferior court.

In the Court of Appeal case of *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702, the court reiterated the above and went on to observe that:

> ... In order to do this he has to examine the record of the proceedings which has been called for by himself or, as in this case, which otherwise comes to his knowledge. In exercising his discretion, the learned judge ought to confine only to the record of the proceedings and nothing else ...

As could be culled from the various authorities such as *R. Ramanathan Chettiar v. Sivarama Subrahmanya Ayyar* ILR 47 Mad 722, *Liaw Kwai Wah & Anor v. Public Prosecutor* [1987] 1 CLJ 35, and *Emperor v. Nasrullah & Ors* AIR [1928] All 287, it is patently obvious that the High Court may examine the record of proceedings in the subordinate courts if it considers that in doing so the purpose of justice will be served, as for example, when the record discloses no offence or when the accused is subjected to a vexatious and groundless prosecution.

Based on the foregoing, what have we here in the appellant's record of appeal?

The record will disclose that, firstly, there is precious little to show that the chemist report was served on the appellant within the meaning of s. 399(1) CPC. Secondly, the record of appeal would show that there are instances of non-compliance with the strict requirements of s. 173 CPC.

The details of these procedural lapses would be expanded in the latter part of this judgment. It would pass muster to say at this stage that after having considered the submissions of both the learned DPP and Mr. Param, counsel for the appellant, and after having considered the authorities cited therein, this court finds that this is not a case where the appellate jurisdiction of this court should be precluded from considering the question whether the plea of guilty, was one which could properly be accepted in the circumstances.

Connected to this is the question of enlargement of time. Although it is agreed generally that applications to the court to exercise its revisionary powers should be made at the first possible moment (*Dorai Manickam v. R* [1936] MLJ 261), it is equally patent that s. 310 CPC enables indulgence to be shown to an appellant who has not given notice of appeal within the prescribed time, in order that substantial justice may be done.

(*Veerasingam v. PP* [1958] 24 MLJ 76). This court had considered the circumstances of the proceedings in the lower court and after having considered these and all the relevant materials thereto, this court is satisfied that it is exercising its discretion correctly in the interest of justice, to allow the appellant's application to amend the notice of appeal as aforementioned.

The Law

It is now imperative to turn to the law governing the issues mentioned in the foregoing. Looking at the manner in which this case was handled even at its earliest stage, it would appear that the rules of procedure have largely been ignored and the whole case was conducted with uncharacteristic speed by the prosecution. From the material before this court as found in the rekod rayuan, there appears to be a hasty investigation made by the police before the charge was preferred against the appellant.

To reiterate, the appellant admitted to the offence on 3 June 1998 and voila! She was charged on 4 June 1998, ie, barely twenty four hours thereafter. One is left wondering what manner of investigation is employed in such a short space of time. Given the customary tardiness in some investigations and without meaning to cast any aspersion on any agency, it hardly seems possible that a proper investigation could be had in the circumstances.

One is therefore reminded of the warning issued by Harun J in *PP v. Tan Kim San* [1980] 2 MLJ 98-99 "... that a person should not be charged in court until the investigation into the case against him has been completed and there is a *prima facie* evidence to prosecute him of the charge.".

This observation is relevant in the context of what follows next.

The unseemly haste in which the appellant was charged by the prosecution is further confirmed in the manner in which the charge was preferred against her. It is banal to stress that the prosecuting officer should observe the strict rules of procedure, for after all, it has an incumbent duty to prove its case.

From the notes of evidence, it is stated that the charge was read, and explained to the appellant to which the appellant pleaded guilty. However, it is not in evidence that the facts of the case (marked as P1) was read to the appellant. It is also not in evidence that the exhibits (ie, Laporan Kimia JB FOR 29/96-0) was read or explained to the appellant. The fact that it was jotted down cryptically by the presiding judge as:

Fakta Kes – P1

Barang Kes – as in P1,

would suggest that the facts of the case **may** have been read to the appellant. The list of the exhibits **may** also have been read and explained to the appellant. In any case, it can be presumed that at the very least, they have been read to the appellant to which she admitted them since it was recorded that:

> P1 dan barang kes diakui benar.

However there is nothing on record to show it had been **explained** to her, thus this court takes issue with the procedure adopted therein by the presiding judge, for it is inimical to the rules, that when an accused pleads guilty to a charge, the brief facts given by the prosecuting officer does not reflect the true and essential elements in the charge (see *PP v. Soon Tiew Choon* [1976] 1 MLJ 189).

Firstly, it is a truism that the prosecution's case relies squarely on the veracity of the chemist report. But there is nothing to show that the presiding judge had cognizance of nor had the judge properly received the said chemist report in evidence, save for the fact that it was tendered as **part** of the items marked **by the Public Prosecutor**, in P1.

Thus, it would appear that the said chemist report marked in ink by the Public Prosecutor as P2 was tendered perforce, as a package deal, without as much as a by your leave. In short, there is nothing to show that it was served, much less explained to the appellant, which would give her time to understand the document and reflect on it and decide whether she should plead guilty or otherwise or even to challenge it by availing to her the rights to require the attendance of the maker of the report as per s. 399(1) CPC.

That being the case, **what** exactly is the offence to which the appellant had pleaded guilty to?. In this connection one could only recall the observation of Sharma J in *Heng Kim Khoon v. PP* [1972] 1 MLJ 30 where His Lordship said that:

> ... an accused does not plead guilty to the facts alleged in the charge which in law are said to disclose an offence under the section named in the charge ...
>
> A plea of guilty only amounts to an admission that the accused committed the acts alleged against him and not an admission of the guilt under a particular section of the Act ...

Since the prosecution's case rests materially on the chemist report, and in the absence of service of the said report, is the accused therefore pleading guilty to a non-offence?

This brings forth the scope and construction of s. 399(1) of the CPC which reads as follows:

> s. 399(1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness –
>
> (a) by the court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

Thus, to render the report admissible in evidence the prosecution must first satisfy the court by oral evidence that the provisions of the proviso to 399(1) CPC have been complied with, that is to say that a copy thereof has been delivered to the accused within the time stipulated in the proviso and until the prosecution has done this, the report cannot be received in evidence. In the absence of such proof, the document is inadmissible; and until such proof is forthcoming it should only be marked for identification.

In the present appeal there being **no** proof of the delivery of the chemist report to the appellant, it stands to reason that the chemist report should not have been received in evidence. Consequently, without the report there is no evidence before the court to establish that the contents of the plastic packet was indeed heroin and therefore the prosecution had failed to prove its case.

Much judicial thought have been engaged in the interpretation of s. 399(1) CPC, and it might be useful to illustrate them here.

The learned DPP's submission is that the prosecution need not comply with the ten day rule requisite in s. 399(1) CPC on the ground that the accused had pleaded guilty (see case of *Eng Song Hai* [1954] 20 MLJ 38 where it was held that **as the appellant had pleaded guilty there was no question**

of the prosecution proving their case and therefore it was not necessary for the learned magistrate to have evidence that the provisions of s. 427(1) of the Criminal Procedure Code of the Straits Settlement had been complied with).

The DPP's submission is supported by her averment in para. 5(a) of her affidavit affirmed on 26 October 1999, wherein she affirmed that the appellant was arrested on 3 June 1998 and charged on 4 June 1998. Therefore, she submitted that it could be inferred that the said chemist report could not possibly have been shown to the appellant **ten days before commencement of trial.**

Mr. Param on the other hand argued that irrespective of whether an accused person pleads guilty or claims trial, the requirements of s. 399(1) of the CPC had to be complied with, as it was more than a mere procedural proviso but a proviso relating to the admissibility of evidence.

The phrase "... provided always that in any case in which the Public Prosecutor intends to give in evidence any such report, he shall deliver a copy thereof ..." appearing in the proviso to s. 399(1) CPC was highlighted by counsel in support of his contention.

Counsel cited the relatively more recent decision of *Heng Kim Khoon v. PP* [1972] 1 MLJ 30. It was argued that *Heng Kim Khoon*, being a more recent pronouncement ought to be applied. It was further argued that where there are conflicting authorities on the issue, the cardinal principle in criminal law that the benefit of the doubt should be given to the accused ought to be applied.

The case of *Tai Chai Keh v. PP* [1948-49] MLJ Supp. 105 was referred to in support of the above contention, wherein it was held that when a doubt arises from a set of facts, the benefit of it must always be in favour of the accused. If doubts relating to facts are to be so construed then so should doubts relating to law.

It was also argued that the learned DPP's contention that as the appellant was charged a day after her arrest and because of that the prosecution could not possibly have complied with the 10-day rule under s. 399(1) CPC, was a flimsy excuse, as the prosecution could easily have recourse to have the case deferred to another date, just so that the necessary procedural requirements of admissibility of evidence are adhered to. This would also ensure that the appellant could then avail herself of her legal rights (ie, whether to send the requisite notice requiring the attendance of the chemist).

The situation necessitates the question whether the requirement of s. 399(1) is merely procedural, where non-compliance becomes an irregularity only and is curable (as in *Ng Yee v. PP* [1953] MLJ 250), **or** whether it is evidential and therefore amounts to an illegality which is not curable under s. 422 CPC (see *Chong Yik v. PP* [1953] MLJ 72, *Wong Kok Keong v. R* [1955] MLJ 13). This issue was discussed in the latter case of *PP v. Lim Chen Len* [1981] 2 MLJ 41 when Azmi J (as he then was) held that the provision of s. 399(1) of the CPC relates to admissibility of evidence and is not merely procedural.

This point was resolved when *PP v. Lim Chen Len* was cited with approval in the Supreme Court's decision of *Ooi Lean Chai v. PP* [1991] 2 CLJ 1304, where the court took the point a step further in holding that the proviso to s. 399(1) of the CPC is a condition precedent and if not complied with, the chemist's report cannot be admitted as evidence without calling the chemist to produce it. The section is not merely a procedural provision but contained rules of admissibility of the chemist's report.

The Supreme Court also had recourse to the decision of Peh Swee Chin J in *Chah Siew Kok v. PP* [1987] 1 CLJ 386 where His Lordship held that if a chemist's report was admitted in contravention of s. 399(1) CPC, it would be an irregularity of a serious nature and the report in such circumstances was **inadmissible** evidence **despite its admission** (emphasis added), as was the case in the present appeal.

However, what is pivotal here is whether service of the chemist report is requisite upon a plea of guilt.

The learned DPP cited *Eng Soon Hai v. PP* [1954] 20 MLJ 38 in support of her submission that since the appellant pleaded guilty it follows that the requirement of the ten-day rule in s. 399(1) CPC does not arise.

This issue is tied up with the issue of construction placed on the phrase "commencement of trial" in s. 399(1) CPC.

The judicial view as seen in several authorities such as *Tay Tuan* [1953] MLJ 20, *Goh Tong v. PP* [1953] 1 MLJ 251, and *Chong Peng v. PP* [1954] 1 MLJ 39, seem settled that the phrase "commencement of the trial" means the commencement of the contentious phase in a trial. This essentially means the commencement of hearing of evidence for the prosecution after the accused has claimed to be tried.

In the later case of *Public Prosecutor v. Lim Chen Len* [1981] 2 MLJ 41 Mohamed Azmi J, gave a palpable tone to the phrase, when His Lordship observed that:

> The meaning of "commencement of the trial" is the commencement of the actual trial itself and not the date when the accused was first charged in court.

Then again in the (then) Supreme Court decision of *Savrimuthu v. PP* [1987] 2 MLJ 173, Salleh Abas LP observed that:

> Whilst we accept that the trial always begins with the reading of the charge and asking the accused to plead, it does not follow that the trial has commenced once the charge is read and the accused says he claims to be tried or even pleads guilty. It all depends upon the intention and understanding of the court and the parties. The reading of the charge can be a mere matter of formality which is done as a matter of course without any intention to proceed to the trial yet.
>
> This happens on the mention date when the court has to fix dates for the trial. But when on the trial date the charge is read, the plea is taken and the prosecution begins to lead evidence, the trial has certainly commenced, and it is commenced naturally with the reading of the charge and the taking of the plea. The reading of the charge is not really the crux of the matter, because even at the continued hearing of part heard cases the reading of the charge is as a matter of course automatically done. Thus in this context the commencement of trial must mean the commencement of the examination, cross-examination and re-examination of one or more witnesses.

This was followed and expanded in the Court of Appeal case of *Sjn. Thomas a/l Manivello v. Lt. Kol. Din Yati b. Dahlan Yg DiPertua Mahkamah Tentera Kuala Lumpur* [1998] 3 CLJ 761, where His Lordship Shaik Daud JCA said that:

> ... On perusal of this finding and that of the other two High Court findings, it seems to me that there are separate meanings given to when a trial begins, and when it commences. It also seems to take into consideration the intention and understanding of court and the parties. Therefore from these decided cases I can come to the conclusion that a **trial begins** when the charge is read to the accused person and his plea is taken, **but it only commences** at the trial proper, ie, when the prosecution calls its first witness. (my emphasis).

Thus *Sjn. Thomas*'s case lends credence to the long line of authorities which decide that "commencement of the trial" is the commencement of the contentious phase of the trial when the prosecution case begins with the calling of its witnesses etc.

However, with respect, it is this court's observation that the distinction given in *Sjn. Thomas*'s case above, ie, when "a trial begins" and when "a trial commences" appears to be an artificial one.

The authorities cited above assume the position that a different mode exists at the point when the accused's plea is taken. If he claims trial, the trial "proper" commences. If he pleads guilty the ensuing proceeding is not deemed a trial. This dichotomy seems a little troubling, not least since whether the accused claims trial or pleads guilty, the court would have to decide the question of fact in issue, and finally whether the accused is guilty or not. When the accused claims trial the prosecution has to prove its case, where witnesses have to be called and cross-examined and exhibits tendered etc. and the authorities are agreed that this proceeding embodies the "commencement of the trial". At the other end of the spectrum, when the accused pleads guilty, the prosecution is **still** required to prove its case by presenting the facts of the case and tendering documents and exhibits, all of which would have to be explained, understood and accepted by the accused. If the accused does not agree to the facts or part thereof, or evidence so adduced, the accused has the right to withdraw her plea. Thus, it is argued that whether an accused person claims trial or pleads guilty, the trial would be deemed to have commenced if the prosecution proceeds to call its witness (when accused claims trial) or adduce evidence by way of statement of facts or documents (when accused pleads guilty).

Whilst the *Sjn. Thomas*'s case is binding on this court, that case did not touch on the position when an accused pleads guilty. It goes without saying therefore, that this issue is still open for deliberation.

The learned DPP argued that if an accused pleads guilty it is not considered a commencement of trial and seems to suggest that there is a cut-off point the moment the accused pleads guilty. The proceeding according to the learned DPP, thereafter seems to undergo a mutation of sorts and assumes a different terminology which is not deemed a "trial" as pronounced by decided cases. However, does the word "trial" in these decided cases entitled to have its own definition not regarded in common parlance? It could, if a **legal** definition is assigned thereto. However in the absence of such a definition, this court finds that a proper scrutiny must be had, since it is crucial that a correct approach is taken to determine the procedure to be adopted by both the prosecution and the defence.

It then begs the question, what is a trial? As defined, "A trial is that step in an action, prosecution or other judicial proceeding by which the question of fact in issue are decided". (See *Jowitts Dictionary of English Law,* 2nd edn).

Therefore on the strength of the above definition, the process by which the prosecution proves its case even on a plea of guilt should be styled as a "trial" in as much as when it enters a "contentious phase". So given its

ordinary meaning, as opposed to a legal one, the ordinary meaning of the term (commencement of a trial) might be used unless a specific and definite term is applied in the statute books to define the said phrase.

Thus I would respectfully agree with the observation made by Justice Storr in *Goh Tong v. PP* [1953] 1 MLJ 167 that:

> ... **a trial commences as soon as the accused has been charged and is in jeopardy**. If that were not so, the fact of an accused pleading guilty and being convicted would not result in a trial at all. The fact by an accused, in answer to the charge, states that he claims to be tried instead of pleading guilty to my mind, merely means that he wishes the prosecution to prove their case against him beyond reasonable doubt. If the trial did not commence until the hearing, neither the charge against the accused nor his plea would form part of it.

Needless to say, this court is in agreement with the judicial pronouncement in *Sjn. Thomas*'s case which defined that the term "commencement of trial" means the point at which the prosecution calls its first witness (when the accused claims trial). Since the Court of Appeal in *Sjn. Thomas* is silent on the issue of what happens when an accused pleads guilty and whether the ensuing procedure adopted constitutes a commencement of trial, this court is of the view that it is open for it to expound on the law, without being at odds with the decision of the Court of Appeal.

It is this court's view that the trial ought also be deemed to have commenced when the accused pleads guilty and the prosecution thereafter proceeds to adduce evidence in support of the charge.

In this case, the accused has a right to change his plea at any time and if he disagrees with the evidence tendered, the trial court has to reject his plea of guilt. Therefore, it is imperative that there be uniformity in the law relating to admissibility of evidence irrespective of whether the accused pleads guilty or claims trial. There cannot be a cut-off point at the "crossroads" where the accused claims trial or pleads guilty to the charge.

To reiterate, this court is of the view that the trial commences when the prosecution calls its first witness (if the accused claims trial as envisaged by the Court of Appeal in *Sjn. Thomas*'s case) or when the prosecution proceeds to adduce evidence such as documents or statement of facts (if the accused pleads guilty).

Such uniformity in the law would lend efficacy to s. 399(1) CPC which provides for the admissibility of certain documents.

If there exists a dichotomy in the law relating to the admissibility of documents as was suggested by the learned DPP, the absurdity of such a situation would be apparent if a document is tendered (without having to comply with s. 399(1) CPC) in a case where the accused pleads guilty initially and thereafter upon disagreeing with the statement of facts or documents put forward by the prosecution, she decides to change her plea and claims trial.

The trial (based on the learned DPP's interpretation) would then be deemed to have commenced.

The problem now would be whether documents tendered earlier by the prosecution (when the accused pleads guilty) are admissible (as they have already been tendered under a different application of the law) or inadmissible (as s. 399(1) CPC is applicable and case laws are clear that its compliance is mandatory).

In order to avoid this unhappy paradox, and in the interest of justice, the provisions in s. 399(1) CPC should be applicable to cases where an accused person pleads guilty and the prosecution proceeds to tender evidence in support of the charge which constitutes "commencement of trial" within the meaning of s. 399(1) CPC. Otherwise the existing dichotomy in the admissibility rules would result in the accused person's rights being trampled upon, as is evident in the present case.

In that connection it is still necessary for the prosecution to prove its case, ie, that what was seized was in fact dangerous drugs as defined in s. 2 of the Act abovementioned, and it needs an expert such as the chemist to prove that. As the chemist had prepared a report, such report is admissible without the need to call the chemist provided s. 399(1) CPC is complied with.

It would be useful to look at the charge which was framed thus:

> Bahawa kamu pada 4hb. Januari 1996, jam lebih kurang 1.20 petang, di KM 38, Jalan Johor Bahru ke Air Hitam, Kulai, dalam daerah Johor Bahru, dalam Negeri Johor bukan sebagai seorang yang telah diberikan kuasa atau disifatkan sebagai seorang yang diberi kuasa di bawah Akta Dadah Berbahaya, 1952, telah didapati di dalam milikan kamu dadah berbahaya jenis heroin seberat 7.7 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39A(2) Akta yang sama.

As could be inferred from the notes of evidence, the chemist report was not served on the accused but was submitted willy nilly as part of the prosecution's case which was presumably read in court and to which the accused hapless as she was, being unrepresented, pleaded guilty to.

As the ten day rule in s. 399(1) CPC is applicable here even though the accused had pleaded guilty, the prosecution is still called upon to properly serve the chemist report, for in the words of Syed Othman J, in *Mohamed b. Abdul Rahman v. PP* [1979] 1 MLJ 252:

> ... if the Public Prosecution intends to use the report as evidence he must supply a copy to the accused ...
>
> ... In my view the proviso cannot be treated as a general exemption to the reservations in the main provision. The words "in any case" appearing in the proviso are intended to subject the prosecution to the main provision and, that is, putting it shortly, the prosecution can only use the report as evidence if the court or the accused (who has to give notice) does not want to examine the maker of the report. Ordinarily if the accused gives proper notice, the prosecution must call the maker of the report and the prosecution must prove its case in the ordinary way.

This court fully agrees with the observation made by the learned judge in the above case, for if the chemist report could indeed be said to be admissible *per se*, then there is little use for s. 399(1) CPC (ie, the same principle is applicable to s. 32 Evidence Act 1950 when the maker is dead or cannot be found but where evidence in respect of which has to be adduced in court).

In the present appeal, it is clear that the prosecution intends to use the report as evidence. But what is the evidence to support the prosecution's fact of the case since there is no service of the chemist report?

Insufficient or improper service (of the report) amounts to no service at all and without the chemist report there is insufficient evidence to justify the conviction.

Even if it is argued that the accused is estopped from questioning the legality of the chemist report after pleading guilty, it is doubtful that this argument can sustain, since an estoppel may not be raised against s. 399(1) CPC which imposes a duty on the prosecution to call the chemist as a witness or give a copy thereof to the accused for him to examine and decide whether to send the requisite notice (again as required under s. 399(1) CPC) or to call the chemist or not.

At this juncture, this court would like to note that from the notes of evidence the procedure followed in the court below appears wanting, bearing in mind the requirements in the relevant rules of the court.

In *Lee Weng Tuck v. PP* [1989] 2 MLJ 143, the court explained that it is an established practice that on a plea of guilt, the prosecution would supply to the court the statement of facts constituting the offence with which the

accused was charged. The statement would then be read and explained to the accused. He then pleads guilty or otherwise. At this point it should be noted that as far as the statement of facts is concerned, there is no statutory provision which imposes a requirement that the court should consider the statement of facts, which is usually tendered to it by the prosecution when the accused pleads guilty.

But past practices have shown that judges find comfort in the knowledge that the statement of facts provide some assistance in gauging the sentence to be cast upon the accused, for it to assess the suitability and felicity of the sentence in the event that it was called into question.

Currently however, courts have been wont to regard the recording of the statement of facts as having evolved into a legal duty and the court **must examine the statement of facts** for the purpose of ensuring that all the elements of the charge are made out therein – see *Mok Swee Kok v. PP* [1994] 3 SLR 140. (emphasis added).

This court is of the view that this is an important safeguard where the accused pleads guilty to the charge, for otherwise there would be no way in which the court could decide whether the elements of the offence had been established, resulting in there being no justification for convicting the accused.

What the presiding judge should do in these circumstances need to be considered and this court will direct its mind to the duties of the presiding judge latterly. But for the present purpose what is crucial is that the prosecution failed to serve the chemist report on the appellant in this case. Without the report it is obvious that there is no evidence before the court to establish that the contents of the packet were indeed dangerous drugs. The prosecution had failed to prove the charge and also, as not to put too fine a point on it, the prosecution had ridden roughshod over the legal niceties.

Thus, the improper admission of evidence in the form of the chemist report had occasioned a failure of justice. In the circumstances it behoves this court to protect its process from abuse and to safeguard an accused person from oppression or prejudice by exercising this court's revisionary powers to quash the conviction and sentence of the lower court and order a retrial.

It is now timely to refer to the duties of the presiding judge in summary trials.

Given the background of this appeal where speed seems to be the order of the day and given the staccato notes of evidence recorded by the presiding judge, a note of disquiet descends over the question of compliance with s. 173 CPC.

The notes of evidence illustrate that the charge was read, explained and apparently understood by the accused. The accused pleaded guilty and it was noted that she understood the nature of the consequence of her plea.

The notes read:

> Pertuduhan dibacakan diterangkan dan difahami, mengaku salah, faham sifat dan akibat pengakuannya;

It went on to record:

> Fakta Kes – P1.
>
> Barang Kes – as in P1
>
> **Court:**
>
> Found guilty/convicted.

It is not in evidence that the presiding judge had been **satisfied** before recording a plea, that the appellant not only understood the nature of the charge and the consequences of her plea but also that she admitted without qualification to the offence charged. This point was amply demonstrated in *R v. Khoo Kee Thye & Ors* [1936] MLJ 243, where the above elements of s. 173 CPC need to be observed.

The presiding judge is also required to **accept** the plea of the accused and record his acceptance thereof before passing sentence.

Case laws abound with regard to the circumspection with which the presiding judge is expected to exercise in recording a plea of guilt. This court can do no better than to quote the observation of Roberts CJ in *Hassan b. Dollah v. Public Prosecutor* [1996] 5 MLJ 291, where His Lordship said that:

> It would be wise in future if magistrates would consider, when taking a plea of guilty, inserting in the record "**section 175 CPC** (which is equivalent to our s. 173 CPC) **complied with**". This will both remind the magistrates of the obligation of that section and, in most cases at least, ensure that an argument is not advanced on appeal to the effect that the section has not been followed.

In *PP v. Leng Chow Teng* [1985] 1 CLJ 157, the Federal Court in referring to the expression "may be convicted thereon under s. 173(b)" said:

> Before a plea of guilty is recorded and accepted it is mandatory under subsection 173(b) for the Court to ascertain that the accused understands the nature and consequences of his plea and that he intends to admit without qualification the offence alleged against him.

Then again in *Heng Kim Khoon v. PP* [1972] 1 MLJ Sharma J said:

> ... The accused is not to be taken at his word when he pleads guilty unless the plea is expressed in unmistakable terms with full appreciation of the essential ingredients of the offence.

The learned judge went on to express disapproval over the use of the "set formula" popularly employed by some presiding judges in such situations, where His Lordship said:

> ... This rule of law is applied with all the greater stringency when the offence charged is complicated or serious and further deprecating the use of the set formula:
>
> > Charge read over and explained to the accused and understood by him. Pleads guilty, understands the nature of consequences of his plea. Plea accepted.
>
> should not be the result of sheer wont of habit as if it was an empty and meaningless ritual ...

This court agrees with the observation above in *Heng Kim Khoon* that the taking down of a plea of guilty is a solenm act and the presiding judge must focus his mind thereat.

Basically s. 173(b) of the Code does not stipulate that after an accused has pleaded guilty, it is for the Public Prosecutor to present the facts of the case in a detailed narrative.

As observed by His Lordship Raja Azlan Shah in *Chen Chong v. PP* [1967] 2 MLJ 130:

> Detailed attention to the facts to be recorded must obviously depend on the nature of the charge and the seriousness of the case.

The decision in *Ganesan s/o Kannan v. PP* [1996] 3 SLR 560, placed emphasis on the safeguards to be observed by the presiding judge.

Firstly, the court must ensure that it is the accused himself who wishes to plead (as happened in the present appeal). Secondly, the court must ascertain whether the accused understands the nature and consequences of his plea. Thirdly, the court must establish that the accused intends to admit without qualification the offence alleged against him.

It was held in *Lee Weng Tuck v. PP* [1989] 2 MLJ 143 that it was insufficient that the plea of guilty under the first safeguard was unequivocal if the other safeguards were not complied with.

Looking at the present appeal there is no doubt that it is the appellant herself who wished to plead guilty.

The notes of evidence showed that the appellant understood the nature and consequences of the charge and the consequences of her plea. However, there is nothing in the notes to suggest that firstly the presiding judge had explained to the appellant the punishment prescribed by law to which she was charged, nor was it shown that the presiding judge was satisfied that the plea was unequivocal, nor is there evidence that the presiding judge accepts and is satisfied with the appellant's plea of guilt.

Thus, this court is of the view that the presiding judge had not fully complied with the strict requirements of s. 173 CPC.

Quite apart from the abovesaid lapses, it is observed that the presiding judge allowed the Public Prosecutor to gloss over the facts of the case wherein the exhibit including the chemist report was tendered, even when there is no evidence to support it. It would have been prudent to adjourn the case, bearing in mind that the appellant was only detained the day before. The appellant should be given time to scrutinise the report and perhaps obtain legal counsel.

Although it is convenient to utilise only brief notes to record the court's proceedings, given that large volume of cases are dealt with by magistrates and sessions judges on a daily basis, the brevity of the proceeding should not be done at the expense of complying with the rules, resulting in injustice to the accused. In short, the procedure in s. 173 CPC should never be trivialised.

This court place emphasis on the duty of presiding judges be they magistrates or sessions judges, of the expectation to be scrupulous when recording pleas from the accused person especially when the plea is one of guilt. Circumspection should be their watchword.

As clearly put by Knox J in *Queen Empress v. Mukundi* Lal ILR 21 All 189 at p. 190:

> The responsibility thrown on magistrates entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down.

This court is satisfied that the departure by the presiding judge in this case from the true and tested path has led to a miscarriage of justice which in turn cuts at the very roots of a fair trial.

Thus, after considering the various issues involved in this appeal, and upon considering the submissions of both the learned DPP and counsel for the appellant, this court finds that there are grounds to act in revision and accordingly quash the conviction and sentence and remit the case to be retried before another Sessions Court.